Sykt Telekom Malaysia v Business Chinese Directory Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–435 –1995
GOPAL SRI RAM, NH CHAN AND AHMAD FAIRUZ JJCA
19 DECEMBER 1996

Civil Procedure *— Trial — Hearing on affidavit evidence — Cross-examination of deponent of affidavit not allowed — Whether judge had correctly considered affidavit evidence — Whether appellate court should interfere*

After the Anton Piller order obtained by the appellant against the respondent was set aside, an inquiry into damages, that might have been sustained by the respondent pursuant to the undertaking that had been given by the appellant when it obtained the order, was carried out. The respondent supported its case by way of affidavit evidence. The appellant applied to cross-examine the deponent of the respondent's affidavit but the judge refused the application. The appellant did not appeal against the refusal to allow cross-examination. The hearing then proceeded on affidavit evidence. The judge having given careful consideration to the affidavit evidence before him came to the conclusion that the respondent had proved its losses. The appellant appealed against this decision.

Held, dismissing the appeal:

(1) While it was undesirable to resolve disputes on affidavit evidence, judges were expected to be critical of the affidavit evidence which must on the face be at least plausible. If allegations were made in affidavits by one party and those allegations were credibly denied by the other party, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations and decide the fate of the case by consideration of the undisputed facts (see pp 694H and 695C); *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin* [1984] 1 MLJ 160 and *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 followed.

(2) Having subjected the judgment appealed against and the affidavits delivered by the parties to close scrutiny, the court was unable to detect any error in the reasoning of the judge. His assessment of the evidence was entirely in accordance with well-settled principles. He was not influenced by any irrelevant consideration, nor did he fail to take into account relevent considerations (see p 695G–H).

[Bahasa Malaysia summary

Selepas perintah Anton Piller yang diperolehi oleh perayu terhadap penentang telah diketepikan, satu siasatan berkenaan ganti rugi, yang mungkin dialami oleh penentang ekoran daripada akujanji yang

telah diberikan oleh perayu ketika ia memperolehi perintah itu, telah dijalankan. Penentang menyokong kesnya dengan keterangan afidavit. Perayu memohon untuk memeriksa balas deponen afidavit penentang tetapi hakim tidak membenarkan permohonan itu. Perayu tidak merayu terhadap keengganan membenarkan pemeriksaan balas. Pembicaraan kemudiannya diadakan atas keterangan afidavit. Hakim selepas memberikan pertimbangan terperinci kepada keterangan afidavit di depannya memutuskan bahawa penentang telah membuktikan kerugiannya. Perayu merayu terhadap keputusan itu.

Diputuskan, menolak rayuan itu:

(1) Walaupun penyelesaian pertelingkahan atas keterangan afidavit adalah tidak diingini, hakim-hakim seharusnya dijangkakan akan bersifat kritikal tentang keterangan afidavit yang mesti pada zahirnya sekurang-kurangnya boleh dipercayai. Jika dakwaan dibuat di dalam afidavit oleh satu pihak dan dakwaan itu dinafikan secara boleh dipercayai oleh pihak yang satu lagi, maka dengan ketiadaan keterangan lisan atau pemeriksaan balas, hakim mesti tidak mempedulikan dakwaan yang dicabar dan memutuskan kes itu dengan mempertimbangkan fakta-fakta yang tidak dicabar itu (lihat ms 694H dan 695C); *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin* [1984] 1 MLJ 160 dan *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 diikut.

(2) Setelah menelitikan secara terperinci penghakiman yang menjadi asas rayuan dan afidavit yang dikemukakan oleh pihak-pihak, mahkamah tidak dapat mengesan apa-apa kesilapan dalam alasan hakim itu. Taksiran keterangan olehnya adalah sepenuhnya mengikut prinsip-prinsip mantap. Beliau tidak dipengaruhi oleh apa-apa pertimbangan yang tidak relevan. Beliau juga tidak gagal mengambil ingatan pertimbangan yang relevan (lihat ms 695G–H).]

Notes

For cases on affidavit, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3595–3596.

Cases referred to

Choo Kim San v Malaysia Borneo Finance Corp (M) Bhd & Anor [1976] 1 MLJ 37

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57

Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420

Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin [1984] 1 MLJ 160

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433

Appeal from: Civil Suit No D3–22–1073–1991 (High Court, Kuala Lumpur)

M Nagarajah (*CM Teng* with him) (*Shook Lin & Bok*) for the appellant.
YS Leong (*Low Hop Bing, Koh Kong & Associates*) for the respondent.

Gopal Sri Ram JCA (delivering the judgment of the court): The appellant in this case, having obtained an Anton Piller order ex parte against the respondent, was unable to sustain it inter partes. The learned judge who set aside the order directed an inquiry into damages that may have been sustained by the respondent pursuant to the undertaking that had been given by the appellant when it obtained the Anton Piller injunction. The appellant's appeal against the discharge of the order was dismissed by the Supreme Court. See *Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420. The learned judge then proceeded to conduct an inquiry into the issue of damages. The facts relevant to this part of the case appear sufficiently in his judgment and we find it unnecessary to reproduce them here.

The respondent supported its case by way of affidavit evidence. The appellant then applied by a summons returnable in chambers for leave to cross-examine the deponent of the respondent's affidavit. This was in accordance with the procedure laid down by Mohd Azmi J (as he then was) in *Choo Kim San v Malaysia Borneo Finance Corp (M) Bhd & Anor* [1976] 1 MLJ 37.

The learned judge refused the application to cross-examine. It was then open to the appellant to appeal against the refusal. The appellant did not, however, do that. Instead, it filed a notice of intention to cross-examine, but quite rightly did not go forward on that notice. We say 'quite rightly' because the learned judge having refused the summons to cross-examine, it was not open to him to review that decision. (See *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57.) So, the hearing proceeded on affidavit evidence.

The principles that govern a case of this nature, where a court is called upon to make a determination based on affidavit evidence, are well-settled and free from any doubt. In *Syed Ibrahim bin Syed Abdul Rahman v Liew Su Chin* [1984] 1 MLJ 160 at p 163, Lee Hun Hoe CJ (Borneo), when delivering the judgment of the former Federal Court, said:

> Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible. As Lord Diplock said in *Eng Mee Yong*'s case [*Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212] at p 217:
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> > '... In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a

> conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth. Since it is a matter upon which the opinions of individual judges may reasonably differ, an appellate court ought not to interfere with the judge's exercise of his discretion under s 327 of the National Land Code unless the way in which he exercised it is shown to have been manifestly wrong ... .'

In *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 436, Lord Templeman said:

> At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.

Now, the observations in the foregoing cases although made in other contexts — the first in the context of the removal of a caveat and the second in the context of a petition to wind up a company — are of general application and are not in any way to be treated as restricted to the circumstances of the particular case.

In the present case, the learned judge having given careful consideration to the affidavit evidence before him came to the conclusion that the respondent had proved its losses. His findings were attacked before us. Counsel submitted that the appellant had, in its evidence, denied the several matters raised by the respondent in the affidavit filed on its behalf. It was also submitted that the learned judge failed to ignore the areas of conflict but found the losses claimed proved upon conflicting testimony. The appellant further complained that the appellant had failed to lead sufficient evidence to prove the losses which were allegedly suffered in consequence of the injunction.

With respect, we are unable to agree with the submissions made on the appellant's behalf. Having subjected the judgment appealed against and the affidavits delivered by the parties to close scrutiny, we are unable to detect any error in the reasoning of the learned judge. We find his assessment of the evidence to be entirely in accordance with the principles enunciated in the cases to which we have earlier referred. We are further satisfied that he was not influenced by any irrelevant consideration, nor did he fail to take into account relevant considerations.

The appellant's complaints overlook at least two important matters.

First, the respondent had led prima facie credible evidence in support of its case. That evidence was neither inherently improbable nor inherently incredible. The respondent had made available all the material in support of its claim to the appellant whose sole complaint in this respect is that the evidence in question is unsatisfactory. While it is true that the burden lies

upon a party who asserts that he has sustained damages to prove the fact, this does not absolve the opposite party from adducing any evidence in rebuttal.

Once, as here, evidence that is prima facie credible has been led by one party, it is for his opponent to lead evidence to prove that the assertions made are not correct. The appellant, however, chose not to do so. It was content to sit back and merely ask the respondent to prove the damages. That is a risk the appellant was entitled to take. But the consequence of the appellant taking such a risk was that the respondent's evidence would be believed by the court. And this is what happened here. The appellant cannot therefore complain if the learned judge, having satisfied himself of the credibility of the respondent's evidence, made the assessment as he did. We may add, in fairness to the learned judge in this case, that he did subject the respondent's evidence to careful scrutiny before arriving at his conclusion under each head of loss.

Secondly, the appellant's argument that no loss was ever suffered because the respondent did not have a licence to carry on its trade is not relevant because, as conceded by Mr Nagarajah, this issue was subsumed in his client's unsuccessful appeal to the Supreme Court. In any event, it appears that the evidence shows that the respondent did have a licence issued to it at some later point in time, and there was no suggestion by counsel that it was not open to the respondent to canvass for orders while awaiting the issuance of the licence.

After having given due consideration to all the submissions made on the appellant's behalf, we came to the conclusion that there was no merit in the appeal. We therefore dismissed the appeal without calling upon counsel for the respondent. The usual orders that are consequent upon a dismissal were made.

Appeal dismissed.

Reported by Kevin Ooi